

GUIDANCE FORM FOR INSTITUTIONAL CONTROLS
FOR SUPERFUND SITES

This document provides instruction for the model Declaration of Restrictive Covenant and Grant of Environmental Protection Easement (“DRC” or DRC “Model”), to be used to place land use or resource use restrictions on real property to protect public health, safety, and welfare, and the environment when required for a Superfund site or sites administered by both the State of Michigan through the Michigan Department of Environmental Quality (“MDEQ”) and the federal government subject to a Record of Decision issued by the United States Environmental Protection Agency (“U.S. EPA”) pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C Section 9601 *et seq.*

The content of a DRC is subject to approval by the MDEQ and must meet the requirements of Section 20114c of Part 201, Environmental Remediation, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (“NREPA”), MCL 324.20101 *et seq.*; and R 299.5524 of the Part 201 Administrative Rules. The final DRC must be based upon the DRC Model and must be recorded with the appropriate Michigan county register of deeds office pursuant to Section 20114c of the NREPA, MCL 324.20114c. The Grantor shall be required to provide the MDEQ with a recorded copy of the DRC within 30 days after recording the DRC with the Michigan county register of deeds. The recording requirements for instruments filed with Michigan county register of deeds offices are contained in Section 1 of the Recording Requirements, 1937 PA 103, as amended (Act 103).

The instructions below explain the information requested in the corresponding blanks identified by letter in the DRC Model. Examples of language appropriate for inclusion in the DRC Model appear in brackets in bold print.

Optional Transfer Tax language in introductory text in the DRC:

Language regarding the Transfer Tax is necessary because under Michigan law, any conveyance of property or any interest in property for consideration is subject to transfer taxes when the value of the consideration paid equals or exceeds \$100.00.

Include the sentence regarding exemption from transfer taxes if the MDEQ will pay an amount less than \$100.00 (including a payment of \$0.00) as consideration for the restrictive covenant or easement; this will be the case for the majority of DRCs executed by the MDEQ.

The applicable transfer taxes must be paid prior to recording any deed or easements with the county register of deeds (MCL 207.11; MCL 207.511).

1. The State of Michigan Real Estate Transfer Tax is \$3.75 per each \$500.00 or fraction thereof of the total value of the property or easement; and
2. The Michigan County Real Estate Transfer Tax varies with county population: \$0.55 per each \$500.00 or fraction thereof of the total value of the property or easement in a county with a population less than 2,000,000; and not more than \$0.75 per each \$500.00 or fraction thereof of the total value of the property or easement, as authorized by the county board of commissioners, in a county with a population of 2,000,000 or more.

Information required on the DRC Model:

- A. The MDEQ Reference Number is assigned by the MDEQ, Remediation Division (RD) staff; and can be obtained by contacting the RD by e-mail at DEQ-RRD@michigan.gov, or by calling 517-373-4805. The MDEQ Reference Number for the document, is in the format: **RC-RRD-201-[insert 2-digit year]-[insert MDEQ assigned number]**. This MDEQ Reference Number ensures the protectiveness, enforcement, and tracking of institutional controls. All institutional controls must have a MDEQ Reference Number assigned and prominently displayed on the first page of the document.
- B. Insert the name of the current owner of the property.
- C. Insert the Superfund site name, as it is commonly known.
- D. Insert the name or identifying title of the Record of Decision ("ROD") or other U.S. EPA and/or MDEQ Decision Document that dictates that the DRC be placed on the property and/or dictates the terms of the DRC.
- E. List any amendments or modifications to the ROD or other Decision Document specified in Paragraph **D** above.
- F. Insert the name of party implementing the response activities specified in the ROD or other Decision Document.
- G. Description of Conditions on Property
 1. Insert a paragraph that; generally describes the nature of activities that resulted in the release of hazardous substances, the location of the release, the media affected by the release (i.e., soils, groundwater), and how the response activities required in the ROD or Decision Document specified in Paragraph **D** above, address risks for all relevant pathways that require restrictions under the ROD or Decision Document.

[NOTE: See Examples (a) and (b) below for illustrations of descriptions that meet the requirements of this section of the DRC Model.

EXAMPLE (a):

Prior to the recording of this Restrictive Covenant and Easement, response activities have been undertaken to remove or treat in-place

some of the hazardous substances. Lead and TCE remain present at levels that require controls to prevent unacceptable exposures. An exposure barrier, consisting of six (6) inches of clean soil and vegetation, has been placed, as described below, to prevent direct contact with the lead impacted soils. A vapor barrier has been placed under Building B (identified in Exhibit 2) to prevent migration of TCE into the building at levels that would result in unacceptable exposures through inhalation.

EXAMPLE (b):

Hazardous substances, including benzene and 2,4-dimethylphenol, have been released and/or disposed of on the Property. The hazardous substances are contained in a tar-like substance that is the waste residue from prior manufacturing activities at the Site. Prior to the recording of this Restrictive Covenant and Easement, response actions have been undertaken to remove certain contaminated soils and waste debris and to treat groundwater contamination resulting from the prior manufacturing activities. The response activities have been implemented at the Site as two operable units ("OUs"): OU1 consisted of a time-critical removal action in 1998-1999 that included removal of 47,043 tons of tar-like waste and debris, installation of a temporary liner in the lower areas depicted on Exhibit 2, and backfilling the depression area with approximately one (1) foot of clean soil; and OU2 consists of the remaining areas of the Site including the contaminated rind and groundwater beneath the Tar Lake Depression Area.]

2. If the Restrictive Covenant and Easement is being recorded in association with response activities that do not address all of the areas of the Property that contain hazardous substances, then (1) insert (as part of Exhibit 2) a survey that identifies those areas of the Property containing hazardous substances above criteria that will not be addressed by the response activities undertaken pursuant to the ROD or other Decision Document; and (2) insert (into the Restrictive Covenant and Easement document) a paragraph describing the areas or conditions not addressed.

[NOTE: See Example below:

EXAMPLE:

Designated areas of the Property described in Exhibit 2 were not addressed in the activities undertaken pursuant to the ***[insert name of the ROD or other Decision Document]*** and may contain hazardous substances in excess of the concentrations developed as the residential criteria under Section 20120a(1)(a) or (17) of the NREPA.]

- H. List all exceedances of criteria as identified in the ROD or other Decision Document specified in Paragraph D.

[EXAMPLE:

Groundwater containing benzene and toluene remains present at the Property at levels exceeding federal maximum contaminant levels and state drinking

water standards.]

- I. Describe the restrictions on land use necessitated by the ROD or other Decision Document specified in Paragraph D. Use Option 1 or Option 2, depending on applicable land use. Use Option 3 if the Property is currently zoned to allow uses of the Property that would not be protective of human health.

[EXAMPLE - Option 1: Language to be used if the Property is used or could be used for any use OTHER THAN residential purposes:

Prohibit all residential uses of the Property. Permissible and impermissible uses compatible with nonresidential uses are generally described in Exhibit 3 (Allowable Uses).]

[EXAMPLE - Option 2 – Language to be used if the Property is used or could be used for residential purposes:

The Property may be used for any purpose, including residential uses, subject to compliance with all restrictions contained in this document that are necessary to protect the effectiveness and integrity of the ***[insert the name of the ROD or other Decision Document]*** and to prevent unacceptable exposures to the contamination left at the Property. Any use of the Property must be consistent with those uses allowed by zoning and the exposure assumptions attributable to the residential cleanup criteria of Section 20120a(1)(c) of the NREPA and the Part 201 Administrative Rules promulgated thereunder.]

[EXAMPLE - Option 3 – If the Property is currently zoned to allow uses of the Property that would not be protective of human health as deemed appropriate by the MDEQ, use the following language:

The Owner shall prohibit the use of the Property for the following uses currently permissible under ***[list provisions of the zoning ordinance that are being explicitly excluded as an allowable use of the Property]*** that would include activities or uses inconsistent with the restrictions set forth in this Restrictive Covenant and Easement, including: ***[list the excluded uses, for example, long-term or short-term residency, including overnight housing, agriculture, special use events, etc.].]***

- J. Insert all additional paragraphs as appropriate if specific prohibitions are required to ensure the protectiveness of the remedy set forth in the ROD or Decision Document specified in Paragraph D.

NOTE: See Examples 1 through 7 below for illustrations of specific prohibitions that meet the requirements of this section:

[EXAMPLE 1 – Language to be used if wells will be prohibited after response activities are completed:

Prohibit the construction of and use of wells or other devices on the Property to extract groundwater for consumption, irrigation, or any other use, except for wells and devices that are necessary for Response Activities or testing and

monitoring groundwater contamination levels in accordance with plans approved by the MDEQ or the U.S. EPA. Short-term dewatering for construction purposes is permitted provided the dewatering, including management and disposal of the groundwater, is conducted in accordance with all applicable local, state, and federal laws and regulations and does not cause or result in a new release, exacerbation of existing contamination, or any other violation of local, state, and federal environmental laws and regulations including, but not limited to, Part 201 of the NREPA.]

[EXAMPLE 2 – Language to be used if construction of buildings will be prohibited unless outside the remedy and approved by the U.S. EPA:

Prohibit and shall not perform any construction of any buildings on the Property unless any such buildings are outside the area affected by the remedy required in **[insert the name of the ROD or other Decision Document]**. (See Exhibit 2 for depiction of areas of restriction) and the building construction plans are submitted to and approved by the U.S. EPA.)]

[EXAMPLE 3 – Language to be used if a landfill cap will be used as an engineered exposure barrier that will be relied upon as a remedial component of the overall remedy approved by the U.S. EPA:

Prohibit any excavation activities, and property use or other activities involving the disturbance of soils, over, or within 10 feet of, the landfill cap as depicted in Exhibit 2.]

[EXAMPLE 4 – Language to be used if buildings exist within the area affected by the remedy and there exists an indoor air exposure threat:

Prohibit all construction of new structures or any modification of existing structures, unless such construction incorporates engineering controls designed to eliminate the potential for subsurface vapor phase hazardous substances at concentrations greater than the MDEQ acceptable soils gas screening concentrations that correspond with the generic assumptions used to develop the Part 201 groundwater and soil volatilization to indoor air inhalation criteria specified in R 299.5714 and R 299.5724, respectively, of the Part 201 Administrative Rules, to migrate into the new or modified structures. Prior to occupancy of any new or modified structures, the Grantor must demonstrate, using then current MDEQ-approved methodologies, that subsurface vapor phase hazardous substances are not creating unacceptable exposures within the new or modified structures and make such documentation available upon request.]

[EXAMPLE 5 – Language to be used if an unacceptable direct contact threat or actual direct exposure concern exists:

Prohibit any excavation or other activities involving disturbance of soils **[below ___ feet Mean Sea Level OR between ___ feet Mean Sea Level and ___ feet Mean Sea Level]** on the Property unless conducted in accordance with applicable state and federal environmental and health and safety laws and regulations. Any contaminated soils or groundwater generated by excavation

or other activities shall be handled and disposed of in accordance with all applicable local, state, and federal laws and regulations and in a manner that does not cause or result in a new release, exacerbation of existing contamination, or any other violation of local, state, and federal environmental laws and regulations including, but not limited to, Part 201 of the NREPA.]

[EXAMPLE 6 – Language to be used if a protective barrier, other than a landfill cap, will be relied upon as a remedial component of the overall remedy:

Prohibit any activity that disturbs the [e.g., building foundation, sheet pile containment system, etc.] unless such activity is conducted in association with appropriate soil characterization and in compliance with applicable state and federal environmental, health, and safety laws and regulations including, but not necessarily limited to, the use of appropriate personal protective equipment.]

[EXAMPLE 7 – Language to be used if the Grantor will maintain a drain or other structure to ensure integrity of remedy and covenants to restrict use of property associated with proper function of drain or structure; include needed survey information in Exhibit 2 and reference the attachment as appropriate, for example:

A French drain has been constructed to prevent contamination from entering the Creek. The French drain and the associated remedial elements are depicted in Exhibit 2. The Owner covenants to ensure that soils in the area between the Creek and the French drain shall be restricted such that no excavation or construction of any kind shall take place within the restricted area surveyed and depicted in Exhibit 2.]

- K.** If appropriate, include language that describes the easements or agreements that exist and are not to be superseded, [e.g., **Except for the terms and conditions set forth in the ADMINISTRATIVE ORDER BY CONSENT FOR ACCESS, MDEQ Reference No. AOC-RD-[2-digit year]-[MDEQ assigned number], effective date [date].**]

L. Permanent Markers

Permanent markers are typically required for cleanups with restrictions to address pathways such as groundwater contact criteria, soil direct contact criteria, etc.

The permanent marker exhibit should specify the text of the inscription, including the MDEQ's Part 201 Site ID Number and the liber and page numbers of the restrictive covenant, and shall also require that the marker include a graphical depiction of the areas subject to the restriction(s) relative to the Property boundaries.

See example of permanent marker exhibit at the end of this Guidance Form.

M. Consent of Easement Holder(s)

Separate consent documents must be obtained for all easement holders when their easements are materially impacted by the land use or resource use restrictions imposed by the Restrictive Covenant and Easement.

See example of easement holder exhibit at the end of this Guidance Form.

EXHIBIT 1

LEGAL DESCRIPTION OF PROPERTY

[This Exhibit must set forth the legal description of the Property in metes and bounds, and must include parcel identification numbers and Tax ID numbers of the Property.]

EXHIBIT 2

SURVEY OF THE PROPERTY

This shall be a survey of the entire Property identified in the legal description provided in Exhibit 1. If land use and resource use restrictions apply to the entire property this survey is sufficient.

If there are areas of the Property not addressed by the response activities undertaken pursuant to the ROD or other Decision Document, and/or if land use and resource use restrictions apply to discrete portions of the Property, then those areas need to be surveyed individually and identified on the survey of the Property identified above, or may be attached as a separate survey contained in this Exhibit.

All surveys must: (1) be conducted by a licensed surveyor; (2) identify, clearly delineate, and graphically depict the spatial extent of the Property boundaries; (3) be signed by the surveyor; (4) be sealed with a surveyor's stamped certificate; (5) have a basis of bearings; and (6) certify compliance with all of the requirements of Certified Surveys, 1970 PA 132, as amended.

Attach Survey of the Property and any attachments thereto.

EXHIBIT 3

DESCRIPTION OF ALLOWABLE USES

Nonresidential Land Use: This land use is characterized by any use which is not residential in nature and is primarily characterized by industrial and commercial uses. Industrial uses typically involve manufacturing operations engaged in processing and manufacturing of materials or products. Other examples of industrial uses are utility companies, industrial research and development, and petroleum bulk storage. Commercial uses include any business or income-producing use such as commercial warehouses, lumber yards, retail gas stations, auto dealerships and service stations, as well as office buildings, banks, and medical/dental offices (not including hospitals). Commercial uses also include retail businesses whose principal activity is the sale of food or merchandise within an enclosed building and personal service establishments which perform services indoors such as health clubs, barber/beauty salons, photographic studios, etc.

Any residential use is specifically prohibited from the nonresidential land use category. This would include the primary use of the property for human habitation and includes structures such as single family dwellings, multiple family structures, mobile homes, condominiums, and apartment buildings. Residential use is also characterized by any use which is intended to house, educate, or provide care for children, the elderly, the infirm, or other sensitive populations, and therefore could include day care centers, educational facilities, hospitals, elder care facilities, and nursing homes. The use of any accessory building or portion of an existing building as a dwelling unit permitted for a proprietor or storekeeper and their families, located in the same building as their place of occupation, or for a watchman or caretaker is also prohibited. Any authority that allows for residential use of the Property as a legal non-conforming use is also restricted per the prohibitions contained in this restrictive covenant.

EXHIBIT [insert number]

PERMANENT MARKERS

The permanent markers necessitated by *[insert the name of the ROD or other Decision Document]* will be inscribed as follows:

[See example below for suggested PERMANENT MARKER LANGUAGE:]

“WARNING”

[List major known contaminants of concern] may be present on a portion of the Property commonly referred to as *[name of special restriction area or provide geographic description]*. The boundaries of the Property, the boundaries of the restricted area(s), and the location of the permanent markers are shown generally below. Excavation activities must be conducted pursuant to a plan approved by the U.S. EPA and the MDEQ. In the event any excavation activities or property use disturbs, disrupts or compromises the 6-inch soil cover, the Owner shall restore the 6-inch soil cover, or equivalent protective cover, within 72 hours. This Property is associated with the MDEQ Site ID number [RC-RRD-201-[insert 2-digit year]-[insert MDEQ assigned number]] and contains *[land use and/or resource use restrictions]* set forth in a Restrictive Covenant and Easement found in the *[insert county name]* County Register of Deeds Office, Liber ____, Pages ____ through ____.]

Further Guidance on Permanent Markers:

- It is required to have at least one permanent marker be placed as part of a remedial action that addresses a landfill or that includes any other engineered containment structure.
- Signs affixed to a fence, post, or buildings are generally not acceptable as permanent markers.
- The marker must be made of stone, cast metal, or some other durable material.
- The statute requires that the marker “describe the restricted areas of the site and the nature of any restrictions.” This is most commonly accomplished by a line drawing of the property boundary and the containment area (some indication of scale and the reader’s location is necessary) along with text that briefly describes the restrictions.
- Submittal for MDEQ- and U.S. EPA-approval of the marker should include specifications for the construction of the marker and the text/illustration that will describe the restricted area and the nature of the restrictions.
- Inspection and maintenance of the marker should be part of the Property's Operation and Maintenance Plan. Maintenance must include keeping vegetation cleared away so that the marker remains visible.

- A single marker is adequate if there is a clear point of entry to the property for a person who might undertake prohibited activities. Typically that is a vehicle entry since a trespasser or person on foot would be unlikely to engage in activities that would result in a major disturbance to a landfill cap or engineered containment structure. (Signs installed on a fence are still appropriate as a warning to trespassers.) If there are multiple points of vehicle entry, multiple markers may be required. Further, permanent marker satellites may need to be placed at each corner of the polygon formed by the restricted area. These satellite markers should contain the words "Restriction Area" and should include a graphical depiction of the areas subject to the restriction relative to the Property boundaries and the location of the other markers.

EXHIBIT [insert number]

CONSENT OF EASEMENT HOLDER[S]

As evidenced below by my signature, I agree and consent to the land use and resource use restrictions and grant of easement specified in this Restrictive Covenant and Easement.

Signed: _____

Name: _____ **[insert name of
easement holder]**

Title: _____

STATE OF _____)

)ss

COUNTY OF _____)

Acknowledged before me in _____ County, Michigan, on _____, _____
[month, day, and year] by _____ **[insert full printed name of Notary
Public]**.

Signature

Notary Public, State of _____,
County of _____

My commission expires: _____

Acting in the County of: _____